

Podcast

Ready to Certify Your Affirmative Action Plans Before July 1, 2024?

By Lisa B. Marsh & Marolhin D. Mendez

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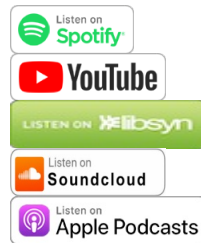
Affirmative Action, OFCCP and
Government Contract Compliance

Details

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Jackson Lewis P.C. · Ready to Certify Your Affirmative Action Plans Before July 1, 2024?



Transcript

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

Government contractors responsible for preparing affirmative action plans must certify that they're actively developing and maintaining them. The deadline for the required certification is July 1st, 2024. The contractor portal helps the Office of Federal Contract Compliance Programs, or OFCCP, ensure that federal contractors prepare their affirmative action plans in a timely manner. On this episode of We get work™, we explain the history of the contractor portal, the difference between certifying the affirmative action plans and the EEO-1 reports, and provide additional tips for making the certification process more manageable.

Our hosts today are Lisa Marsh, principal in the Denver office, and Marolhin Mendez, associate in the Long Island office of Jackson Lewis. As members of the affirmative action, OFCCP, and government contract compliance group, they help federal contractors draft affirmative action plans and represent government and non-government contractors in OFCCP matters. Lisa and Marolhin, the question on everyone's mind today is, why must federal contractors update and certify their affirmative action plans this year? And how does that impact my business?

Thank you, Alitia. I am excited to be talking with you about this today, Marolhin,

because I know you and I have been thinking about the contractor portal for the last couple of weeks, maybe the last couple of months, maybe the last couple of years, right? We've been thinking about it and talking about it. And we know that government contractors that are required to prepare affirmative action plans under OFCCP's regulations have a deadline coming up. It's right around the corner. Is that right? And what is it?

That's right, Lisa. So there is a deadline coming up. It is July 1, 2024. And that deadline is for a requirement that federal contractors go on to the contractor portal, the OFCCP contractor portal, and certified to option one, that they're developing and maintaining their affirmative action plans each year. So they're not actually uploading their affirmative action plan. They're just certifying that the plans exist, that they're developing and maintaining their plans each year. And the portal opened up a couple of weeks ago on April 1. So as of April 1 or beginning April 1, contractors are able to go on to the portal and certify to that option one.

OK, great. So they could do it now. All right, good. Well, let's take a step back and kind of figure out where this all came from, because we know that this hasn't always been a requirement and it actually started for the first time government contractors had to go on and certify that they are developing and maintaining their affirmative action plans back in 2022. And though at this moment that feels like a long time ago, this actually really is a bit more of a new requirement and government contractors are still kind of getting their arms around the requirement and making sure that it's on their tickler system to every year go in and certify and update where they need to because of course there's some data that they'll need to update. Like you said, we're not uploading the full affirmative action plan, but there's some information that needs to be updated within the portal itself.

Now, of course, not every company that contracts with the government is required to go into this system. And that's because not every company is required to prepare an affirmative action plan. But as we all know, there are certain thresholds that trigger that requirement to prepare affirmative action plans.

So those are companies that are contracting with the government at a certain threshold level, right? That contract level is \$50,000 or more. And they have to have certain number of employees, so 50 or more. But once they hit that trigger and are required to prepare affirmative action plans, then this requirement to go in and certify on the AAP portal is also there, unless of course they are a construction contract and they're only required to prepare construction affirmative action plans, then those folks aren't required yet to go on and certify. But everybody else who's required to prepare affirmative action plans needs to go in and certify. So where did this all come from?

As you may remember, I think back in 2016, there was a report released from the US GAO, the United States Government Accountability Office, that was essentially reviewing the efficiency and effectiveness of OFCCP and found that I think it was something upwards of 80% of contractors weren't submitting their affirmative action plans when they got audited on time. And so the conclusion was that government contractors weren't actually preparing their affirmative action plans every year like they were supposed to be. And so OFCCP wanted to create this

portal as a way to ensure that government contractors are every year preparing their affirmative action plans because of course we know that the agency can't audit all of the government contractors and their locations to make sure. So this is kind of where this came from.

So the first time that this was live and government contractors could go in and certify was 2022. And OFCCP had actually loaded into the system, I think as a way to maybe make it easier on contractors, data from EEO-1 reports, right? The 2018 EEO-1 reports is actually the data that was there when government contractors went and registered. And so I think that caused a little bit of confusion because to this day, when government contractors, new contractors register, they have to put in the company ID and the unit number. Those are all things that come from the EEO-1 report. But this is not an EEO-1 report certification portal. Right, Marolhin?

Because the EEO-1 reports are actually administered by EEOC, a different agency. OFCCP doesn't oversee EEO-1 reports. And in fact, we know that the rules for preparing affirmative action plans and submitting EEO-1 reports, they're different. So it's not going to always marry up exactly in terms of those numbers. And of course, if it was data from 2018, how many large companies have changed completely since 2018 when they were first putting in their affirmative action plan data in 2022.

So this is important to remember. When you're going in and you're certifying your different affirmative action plans, take a look at the locations. If there's not an AAP at that location, even if there's an EEO-1 report for that location, you wanna close it. That's part of OFCCP's guidance. We are certifying affirmative action plans, not EEO-1 reports. So good to remember that. It can be a little bit confusing. And Lisa, what about government contractors that do not prepare EEO-1 reports?

Yeah. Great question. Because we know some people who are required to prepare affirmative action plans, some organizations that have to prepare AAPs, they don't have to and can't prepare EEO-1 reports. I'm thinking of universities. They don't submit EEO-1 reports. So what are they supposed to do there? Can they go in? Can they go in and certify?

So the good news is that the OFCCP contractor website actually includes a section for those government contractors that do not have to file an EEO-1 report, such as educational institutions. So there is the educational institutions registration instructions. And that there allows government contractors that do not have the EEO-1 information to register their locations, like educational institutions that use iPads, for example. So there is a section dedicated to those contractors that do not have EO-1 reports.

Yeah, and good point. There are a lot of resources online that OFCCP has put up on the AAP portal section, right? There's the FAQs, there's a user guide, and within that user guide, there's instructions about how companies can move forward. And I think there's a checkbox they can click that says that they don't have that EEO-1 information. But good to know that that's available for them there. So included in the website is also the OFCCP help desk, which I imagine is going to be bombarded with inquiries as the time goes on. So what is your tip there?

Yeah, great question. Thank you for asking. Because we're happy that there is a help desk available and you can find there's a phone number and there's an online form that contractors can use to contact the OFCCP technical assistance help desk. And so that's great that that's there. But just like any help desk, there is likely going to be a lot more traffic getting up towards the due date. And so this is my number one tip for folks out there. I say go ahead and start early, right? So thinking about our passwords, thinking about being able to get onto the portal, even if you're not ready to certify, but go ahead and get on now and make sure you have access because we know that passwords are everywhere and we all have lots and lots of passwords. I don't know about you, but I can barely remember what I did last month and remembering a password that I might have set up and not, thought about for the past 12 months can really be difficult, right? So we want folks to not wait till the last minute because the good news is that the folks that put together this portal really had data security in mind, and we're thankful for that. Data privacy is something that's on all of our minds. Though we are not uploading the affirmative action plan in its entirety, like you mentioned, there is some data, there's some information that's in there. So we appreciate that there's this extra layer of security, but it does just make things that much more difficult. There is the second factor authentication, right? So assuming you remember your password, do you remember what you set up as your second factor authentication? That can be anything from a text to downloading an app to downloading codes, you know, and so we want to anticipate maybe not necessarily remembering right off the bat where those codes were saved.

Or there's the possibility that the person who set up access is no longer with the organization or is doing something completely different within the organization. And you're gonna need to do the work to be able to get access to that. And like I said, there's that help desk that's available. However, the closer we get to the deadline I would say probably the less responsive OFCCP is going to end up being because they'll just have this queue of questions. So what we don't want is for folks to do everything correctly, you're getting your affirmative action plans prepared every year as required, but then you're not able to go in and actually certify because you misplaced your password or waited till the last minute to try to get access switched from someone who's no longer with the organization.

Number one tip, let's go on early now. Make sure you can get in and access, and if you need to access the help desk, go ahead and reach out to them now before the line gets really long because we don't want you to get caught not being able to certify.

That's a great tip, Lisa. I think that the second biggest tip would be for contractors to know that the portal allows multiple users from individual organizations to register, manage records and certify each establishment and or functional business unit. So I highly recommend that you have multiple users and have multiple ways of accessing the portal, right? You never know if someone is out on leave or if, you know, they just can't log in or they're unavailable. So having more than one user with access to the portal is highly recommended.

Great. Great point. And of course we know that not only do we not want to not have done something that's required, right? We want to be able to fulfill our

obligations, but we know that not being able to certify could potentially have some additional consequences. Is that right?

That is right, Lisa. We've seen in the past that for contractors that fail to certify on the portal by the deadline, they were more likely to appear on OFCCP scheduling list. And as a matter of fact, the scheduling list that was published in January of 2023, the methodology included that. They mentioned that contractors that fail to certify are appearing on this list. So we never want to be in a position where you are ready to certify, you have everything good to go, but because you can't remember your password or you don't have access to it because the one person that has access to the portal is on leave. We don't want you to be in that position, right? So we don't want to fail to certify because it is more likely that you'll appear on the scheduling list and then subject to an OFCCP compliance evaluation.

Right. I was going to say, and for our listeners who aren't familiar with what we mean when we say a scheduling list, that is the list that OFCCP puts out that indicates which companies, which organizations and which locations within those organizations are selected for audit.

So we want to make sure that we are certifying to be able to not increase our chances of getting audited. Now, of course, Marolhin, you and I know that simply going in and completing the certification won't necessarily keep us from being audited, right? Government contractors may still be audited, and OFCCP uses a neutral algorithm to go in and select contractors. But we know not certifying may, as it has in the past and may again in the future, make it more likely that you would get audited. So it sounds like this is the third year of this requirement where federal contractors have to go on to this portal and then certified that they're developing and maintaining their affirmative action plan. So what is different this year? And what we noticed this year is that the OFCCP shifted the opening of the portal from March 31st to April 1st.

So what that means is that contractors with an April 1 affirmative action plan year, they will no longer be able to certify because their plans expired on March 31st. So that means they need to hurry up and prepare their affirmative action plans before the deadline in order to certify on time.

Got it, right. We're talking about those that have an affirmative action plan as of April 1st. They can't go in on March 31st and certify on their prior year plans. That makes sense. Yeah.

So thank you so much, Lisa, for joining me and having this conversation about the portal. Just as a reminder, the portal opened up April 1st and the deadline is July 1st. So you have the tips and the tricks from Lisa and I for you to go ahead and certify. We want you to go ahead and get that done. Thanks so much for talking with me today, Marolhin.

Absolutely.

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